IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 5, 2008

STATE OF TENNESSEE v. ALONZO FISHBACK a/k/a LORANZO WILHOITE

Appeal from the Circuit Court for Rutherford County
No. F-58990 Allen W. Wallace, Judge

No. M2007-01971-CCA-R3-CD - Filed June 24, 2008

Appellant, Alonzo Fishback, also known as Loranzo Wilhoite, was convicted by a Rutherford County jury of especially aggravated kidnapping, aggravated assault, and possession of a weapon during the commission of a felony. The trial court sentenced Appellant to sixty years for the especially aggravated kidnapping conviction, fifteen years for the aggravated assault conviction, and two years for possession of a weapon during the commission of a felony conviction. The trial court ordered the sentences for especially aggravated kidnapping and aggravated assault to run consecutively to each other. The trial court ordered the sentence for the weapons charge to run concurrently, for a total effective sentence of seventy-five years. The trial court also ordered the especially aggravated kidnapping charge to run consecutively to "any offense on parole." Appellant filed a motion for new trial in which he argued that his convictions for especially aggravated kidnapping and aggravated assault violated *State v. Anthony*, 817 S.W.2d 299 (Tenn. 1991). The trial court denied the motion. We conclude that the confinement of the victim was (1) beyond that necessary to consummate the assault and the additional confinement of the victim: (2) prevented the victim from summoning help; and (3) lessened Appellant's risk of detection. Consequently, the judgments of the trial court are affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court are Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and DAVID H. WELLES, J., joined.

Barry R. Tidwell, Murfreesboro, Tennessee, for Appellant, Alonzo Fishback.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; William C. Whitesell, Jr., District Attorney General, for the appellee, State of Tennessee.

OPINION

On April 25, 2005, Patricia Forkum, the victim, was the manager of Hot Spot Tanning in Smyrna, Tennessee. That morning, Appellant came into the store to inquire about tanning packages. When Appellant entered the store, Ms. Forkum was cleaning one of the tanning rooms. Several people had just finished their tanning sessions. Ms. Forkum was responsible for cleaning the rooms and preparing them for the next round of clients. Ms. Forkum knew that someone had entered the store because she heard the doorbell that rang whenever someone entered or exited the store. There were one or two other clients in the store at that time.

Mr. Forkham went to the front of the store when she heard the bell ring. She saw Appellant at the front desk. Mr. Forkham described Appellant as approximately six feet five inches tall and weighing about 275 to 300 pounds. Mr. Forkham is five feet eight inches tall and approximately 145 pounds. Appellant inquired about several tanning packages. Ms. Forkham explained the various packages to Appellant and gave him some information about their specials. The victim then helped another client by taking her to a tanning room. When the victim returned to the front of the store, Appellant was still there. Appellant asked the victim about the various tanning beds and "asked specifically if [they] had a stand-up bed." The victim told Appellant that they had a stand-up bed that was located in the back of the store. Appellant wanted to see it, so they walked to the back of the store where that bed was located in a "very small room." The victim entered the room first and explained to Appellant "what the bed did and where everything was in the room." When she turned back around Appellant "was in the room with [her]," blocking the door. Appellant told her to "take off [her] clothes" and "get in there [the tanning bed]." The victim told Appellant "no." Appellant got closer to the victim. She "didn't want him to come any closer. So [she] put [her] hand on his chest." Appellant grabbed her wrist and held onto it. Appellant again told the victim to take off her clothes. She refused. The victim then noticed "something in [Appellant's] hand that he was starting to come up toward me with." The item was "silver and kind of shiny looking, and it was pointed." The victim thought it was a knife, so she "grabbed [Appellant's] wrist to push it down to keep him from stabbing [her]." Appellant had scissors in his hand.

At that time, the doorbell rang and Appellant was "startled." Appellant stepped backward out of the small room and walked up toward the front of the store. The victim followed him to the front of the store. When Appellant saw that there was not anyone at the front of the store, he turned back around "like he was going to come back down the hall" toward the victim. The victim started banging on the door of one of the tanning rooms that was occupied by a client. The client responded by saying that the room was occupied. Then, the victim turned and told Appellant to "get out." Appellant left through the front of the building.

The victim locked the door to the store and called the police. The victim estimated that the entire encounter in the small room lasted five to seven seconds. The victim did not have an exit from the small room because Appellant was "blocking" the door to the tanning room. The tanning room

had walls and a door, but the walls did not go all the way to the ceiling, for "ventilation" purposes.

As a result of the incident, Appellant was indicted by the Rutherford County Grand Jury for especially aggravated kidnapping, aggravated assault, and possession of a weapon during the commission of a felony. A Rutherford County Jury convicted Appellant of the charges as listed in the indictment after hearing the victim's testimony.

The trial court held a sentencing hearing at which the trial court determined that Appellant was a career offender for the purposes of the especially aggravated kidnapping and aggravated assault convictions. The trial court sentenced Appellant to sixty years for the especially aggravated kidnapping conviction and fifteen years for the aggravated assault conviction. The trial court ordered that these two sentences be served consecutively. In addition, the trial court ordered the sentence for especially aggravated kidnapping to run consecutively to "any offense [for which Appellant was] on parole." The trial court sentenced Appellant as a Range I, standard offender to two years for the conviction for possession of a weapon during the commission of a felony. This sentence was ordered to be served concurrently to the sentences for especially aggravated kidnapping and aggravated assault, for a total effective sentence of seventy-five years.

Appellant filed a timely motion for new trial in which he argued, among other things, that his convictions for especially aggravated kidnapping and aggravated assault should have been merged by the trial court pursuant to *State v. Anthony*, 817 S.W.2d 299 (Tenn. 1991). The trial court denied the motion for new trial and this appeal followed.

Analysis

On appeal, Appellant argues that his dual convictions for especially aggravated kidnapping and aggravated assault violate *State v. Anthony*, 817 S.W.2d 299 (Tenn. 1991). Specifically, Appellant argues that his actions did not go "beyond that which was [sic] needed to commit the Aggravated Assault." Further, Appellant contends that there is nothing in the record to indicate that Appellant's confinement of the victim prevented her from summoning help, lessened the risk of Appellant being detected, or created a significant danger of increased risk of harm to the victim. The State, quoting *State v. Dixon*, 957 S.W.2d 532, 535 (Tenn. 1997), counters that "because no restraint is necessary to accomplish an aggravated assault, *any* restraint used in the commission of an aggravated assault 'may support a separate conviction for kidnapping.'"

In *Anthony*, our supreme court addressed the issue of whether dual convictions for armed robbery and aggravated kidnapping violated the due process guarantees of Article I, section 8 of the Tennessee Constitution. The court concluded that when a confinement, movement, or detention is "essentially incidental" to an accompanying felony, such as robbery or rape, it is not sufficient to support a separate conviction for kidnapping. *Anthony*, 817 S.W.2d at 306. The court warned that the kidnapping statute should be narrowly construed "so as to make its reach fundamentally fair and to protect the due process rights of every citizen . . . ." *Id.* In other words, before a defendant may be convicted of a kidnapping charge, the trial court must determine "whether the confinement,

movement, or detention [involved in the individual's case] is essentially incidental to the accompanying felony and is not, therefore, sufficient to support a separate conviction for kidnapping, or whether it is significant enough, in and of itself, to warrant independent prosecution and is, therefore, sufficient to support such a conviction." *Id.* "[O]ne method of resolving this question is to ask whether the defendant's conduct 'substantially increased [the] risk of harm over and above that necessarily present in the [attending] crime . . . itself.'" *Id.* (quoting *State v. Rollins*, 605 S.W.2d 828, 830 (Tenn. Crim. App. 1980)).

In *State v. Dixon*, 957 S.W.2d 532 (Tenn. 1997), the supreme court further refined the approach to be taken when analyzing these issues. *See* 957 S.W.2d at 535. The reviewing court must ascertain "whether the movement or confinement was beyond that necessary to consummate the act of" the accompanying offense. *Id.* "If so, the next inquiry is whether the additional movement or confinement: (1) prevented the victim from summoning help; (2) lessened the defendant's risk of detection; or (3) created a significant danger or increased the victim's risk of harm." *Id.* The *Dixon* court clearly stated that the intent is not to provide a defendant with "a free kidnapping merely because he [or she] also committed" the primary offense, but rather merely to "prevent the injustice which would occur if a defendant could be convicted of kidnapping where the only restraint utilized was that necessary to complete the act of" the accompanying crime. *Id.* at 534.

Most recently, in *State v. Antonio D. Richardson*, No. M2005-01161-SC-R11-CD, 2008 WL 1959952, ___ S.W.3d ___ (Tenn. May 7, 2008), our supreme court clarified the process for determining whether dual convictions for kidnapping and an accompanying offense violate due process. In *Antonio D. Richardson*, the court noted that the two-part test pronounced in *Dixon* "fully replaces" the "essentially incidental" analysis that was espoused in *Anthony*. *Id.* at *4. The court made clear that the *Anthony* analysis "should not be used in conjunction with the *Dixon* two-part test" and that the *Dixon* test is the exclusive test for "all future inquiries." *Id.*

One commits aggravated assault relevant to the instant cases who intentionally or knowingly causes another person to reasonably fear imminent bodily injury by the use or display of a deadly weapon. *See* T.C.A. § 39-13-101(a)(2); T.C.A. § 39-13-102(a)(1)(B).

Especially aggravated kidnapping is defined as "knowingly remov[ing] or confin[ing] another unlawfully so as to interfere substantially with the other's liberty," T.C.A. § 39-13-302(a), "accomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon." T.C.A. § 39-13-305(a)(1).

Applying those principles to the case herein, we agree with the State that, unlike the crime of kidnapping, an assault does not inherently require the restraint, detention, or confinement of anyone. Thus, because no restraint is necessary to accomplish an assault, any restraint used in the commission of an assault "may support a separate conviction for kidnapping." *Dixon*, 957 S.W.2d at 535. The conviction in this case will therefore pass due process muster so long as the restraint prevented the victim from summoning help, lessened Appellant's risk of detection, or increased the victim's risk of harm. *See id.*

Appellant argues that blocking the victim from leaving the tanning room did not affect her ability to summon help because the walls of the room did not go all the way to the ceiling. Appellant also argues that his actions did nothing to lessen the risk of his detection because the front door to the store was not locked when he entered the store. Further, Appellant contends this is bolstered by the fact that he knew that there was another customer in the store at the time of the kidnapping; he was present when the customer entered the store and waited on the victim to assist that customer. Appellant also argues that he did not shut the door to the room or attempt to shut the door to the room while blocking the victim from leaving. Finally, Appellant contends that the brief confinement did not increase the victim's risk of harm "beyond that which was involved in the aggravated assault." We must disagree with Appellant's position.

We conclude that Appellant's conviction for especially aggravated kidnapping is constitutionally sound. "[I[t is the purpose of the removal or confinement and not the distance or duration that supplies a necessary element of aggravated kidnapping." *Id.* The confinement was not a necessary component of the aggravated assault. In fact, the kidnapping actually preceded the assault. Appellant followed her into the small tanning room and physically blocked the door so that she was not able to leave. When the victim tried to push Appellant away, he assaulted her by grabbing her wrist and he began to raise a "shiny" and "sharp" object toward her as if to stab her. Confining her in the small room was not necessary for Appellant to assault Ms. Forkum with a pair of scissors. Thus, the facts pass the first part of the *Dixon* test. Moving on to the second prong of the *Dixon* test, we determine that Appellant's act of confining the victim in the small room certainly prevented the victim from summoning help and lessened Appellant's risk of detection. Appellant, pretending to be a prospective customer, persuaded Ms. Forkum to take him to the back of the tanning salon to a small room rather than commit his assault in the front of the salon where he would be more likely be detected. This also made it more difficult for her to summon help from passersby at the front of the salon or from other customers. Indeed, when the fortuity of the doorbell ringing occurred, stalling Appellant and allowing Ms. Forkum to escape, she had difficulty getting help by knocking on the doors of other tanning compartments. Appellant was not and is not entitled to a "free kidnapping." *Id.* at 534. The two crimes were distinct. *See e.g.*, *State v. Grandon Day*, No. M2005-01220-CCA-R3-CD, 2007 WL 596661, at *4 (Tenn. Crim. App., at Nashville, Feb. 27, 2007), *perm. app. denied*, (Tenn. Jun. 18, 2007); *State v. Lula J. Flanigan*, No. 03C01-9708-CR-00330, 1998 WL 338207, at *3 (Tenn. Crim. App., at Knoxville, Jun. 26, 1998); *State v. Joseph Tipler*, No. 02C01-9611-CR-00384, 1998 WL 32683, at *3 (Tenn. Crim. App., at Jackson, Jan. 30, 1998), *perm. app. denied*, (Tenn. Oct. 12, 1998). Appellant's conviction for especially aggravated kidnapping does not violate due process according to the two-part test provided in *Dixon* and upheld in *Antonio D. Richardson*. We find this issue to be without merit.

Conclusion

For the foregoing reasons, the judgments of the trial court are affirmed.

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JERRY L. SMITH, JUDGE